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TO: Councilmember Carol Fukunaga, KPIF Co-chair
FROM: Jennifer Waihee-Polk, Department of the Corporation Counsel
RE: Response to KPIF Working Group Questions*

2015 NOV -2 PM 3:57

Below are my comments to the questions identified for the Department of the Corporation Counsel. Please note that my comments, which are limited to materials and positions of the City, are made as a participant of the Kakaako Public Infrastructure and Facilities Working Group (pursuant to City Council Resolution 15-45 (2015)) and do not provide legal advice.

Unfortunately, I cannot provide legal opinions for the working group, which includes individuals from outside the City. As you know, the Department of the Corporation Counsel is only authorized to provide legal advice to City officers, employees and agencies.

My responses are not intended to reflect all applicable laws, but the ones that appear most relevant.

Question no. 2:

"What is the legal status of private roads? What is the law regarding streets that do not have posted signs designating them as private? If no signs designating roads as private have been posted, what is the law regarding ownership after a designated period of years have passed (i.e., adverse possession, etc.)?"

Please see [posted] copy of HRS Section 264-1:

HRS Section 264-1(c)(2) provides as follows:

"All roads, alleys, streets, ways, lanes, trails, bikeways, and bridges in the State, opened, laid out, or built by private parties and dedicated or surrendered to the public use, are declared to be public highways or public trails as follows:

(1) Dedication of public highways or trails shall be by deed of conveyance naming the State as grantee in the case of a state highway or trail and naming the county as grantee in the case of a county highway or trail. The deed of conveyance shall be delivered to and accepted by the director of transportation in the case of a state highway or the board of land and natural resources in the case of a state trail. In the case of a county highway or county trail, the deed shall be delivered to and accepted by the legislative body of a county.

(2) Surrender of public highways or trails shall be deemed to have taken place if no act of ownership by the owner of the road, alley, street, bikeway, way, lane, trail, or bridge has been exercised for five years and when, in the case of a county highway, in addition thereto, the legislative body of the county has, thereafter, by a resolution, adopted the same as a county highway or trail.

In every case where the road, alley, street, bikeway, way, lane, trail, bridge, or highway is constructed and completed as required by any ordinance of the county or any rule, regulation, or resolution thereof having the effect of law, the legislative body of the county shall accept the dedication or surrender of the same without exercise of discretion."

Question no. 3:

"Have private street "owners" been paying taxes? Are taxes required on privately owned roads?"

The Real Property Assessment Division of the City Department of Budget and Fiscal Services advises that, in order to assess taxes to the owner of real property, it requires:

- A legal description of the private property (so that the office can create a tax key number); and
- That the owner of the private property be identified in Land Court or with the Bureau of Conveyances.

According to the BFS Real Property Assessment Division, private streets open to the public are usually nominally taxed; however, charging for parking is viewed as commercial business and such street owners will not be nominally taxed.

Question no. 4:

"What actions have the State or Counties taken in other private road ownership situations/disputes (i.e., road surrender, no entity claiming ownership of road, etc.)?"

None to my knowledge.

Question no. 6:

"Who owns the surrounding streets on Map D-2 (from October 14, 2015 handout – County Division of Land Survey and Acquisition Map) and how is HCDA involved? Can Map D-2 be updated to reflect existing conditions as of October 2015?"

The Land Division of the City Department of Design and Construction advises that:

- Map D-2 can be updated by request to DDC Land Division.
- Update of Map D-2 would probably take about 2-3 months.
- A summary of the ownership of the surrounding streets can also be made by request to DDC Land Division, however the request would need to clarify the exact streets at issue (i.e., how many streets are considered "surrounding").
- The time it would take to provide a summary of the surrounding streets would depend on the amount of streets at issue, but would probably take more than 3 months.

Question no. 9:

"What is the best way to restore maintenance to the private roads whose maintenance currently has been halted?"

Please see [posted] copy of ROH Section 14-32.2.

HRS Section 264-1(a) provides as follows:

"Subject to the availability of appropriations, the department of facility maintenance may maintain by either remedial patching, resurfacing, or paving those portions of private, nondedicated and nonsurrendered streets and roads which have been determined by the chief engineer of the department of facility maintenance, with the approval of the director of the department of transportation services and the director of the department of planning and permitting, to meet the following criteria:

- (1) The street or road has not been dedicated or surrendered to the city or any other governmental entity, and is not otherwise owned by the city or any other governmental entity;
- (2) The street or road is not maintained by any governmental entity other than the city pursuant to this article;
- (3) The street or road is open to, serves, and benefits the general public;
- (4) The street or road is not signed, marked, delineated, fenced, barricaded, or otherwise designed, constructed or operated to exclude access by the general public, in whole or in part, which may be through such means as signs indicating that the street or road is a "private" street or road, or any restrictions on parking which are not applicable to all persons except as otherwise provided by law;

- (5) The street or road directly serves: (A) six or more parcels and at least six of the parcels served are owned by separate individuals or entities; (B) six or more residential structures where at least six of the structures served are owned by separate individuals or entities; or (C) a parcel of land which has one or more condominium buildings or apartment buildings which contain six or more condominium or apartment units;
- (6) The street or road is not part of a cluster housing development, planned development, or similar type of development;
- (7) Maintenance of the street or road by the city will be practicable and safe;
- (8) The street or road is not a private street or road within the meaning of Chapter 22 or the rules and regulations adopted pursuant thereto;
- (9) The developer or subdivider of such street or road has not agreed to maintain such street or road in perpetuity;
- (10) An association of apartment owners or homeowners association does not maintain such street or road;
- (11) Maintenance of the street or road surface is necessary to protect the safety of motorists, bicyclists, and pedestrians or is otherwise in the public interest; and
- (12) The street or road does not suffer such design defects as to make use of the street or road hazardous to the general public.

If they wish a private street or road to be maintained by the city, the persons collectively owning a 60 percent or more interest in the fee title or an appropriate roadway easement in the street or road shall initiate and submit a written request to the chief engineer of the department of facility maintenance for the maintenance of the street or road. If the chief engineer of the department of facility maintenance determines that the private street or road satisfies the criteria set forth in this subsection, the chief engineer of the department of facility maintenance may, subject to the availability of appropriations, proceed to maintain the street or road, provided that the persons having the right to control the use of the street or road shall submit their written approval of the maintenance work. The persons having the right to control the use of the street or road shall agree to such terms, conditions and covenants as may be determined by the chief engineer of the department of facility maintenance to be for the convenience and protection of the city and the public, including the granting of necessary easements; provided that one of the conditions the persons having the right to control the use of the street or road shall agree to is the condition that they keep the street or road open to the general public for as long as the city maintains the street or road surface or for the period of time specified in the agreement, whichever is longer. The requirement for a written request, approval and agreement shall not apply, however, to a (i) street or road over which the department of facility maintenance exercises surface maintenance responsibilities on the day prior to the effective date of this article, or (ii) a street or road which the chief engineer of the department of facility maintenance, with the approval of the director of the department of transportation services and the director of the department of planning and permitting determines has been dedicated by implication to public use for roadway purposes; provided that nothing contained herein shall be construed as prohibiting the chief engineer of the department of facility maintenance from requiring a written approval and agreement for new maintenance work on streets or roads over which the department of facility maintenance exercises surface maintenance responsibilities on the day prior to the effective date of this article if the chief engineer of the department of facility maintenance determines that such an agreement is in the best interests of the city."

Question no. 10:

"Can a private owner dedicate only the paved portion of the road to the public, and reserve the road right of way for private purpose? Can a person who dedicates a roadway to the public only dedicate the paved portion?"

We are not aware of a situation in which this has occurred.

Question no. 11:

"What are the exact limitations on Honolulu city government's ability to plan for areas along private roads or to upgrade them or utilities within their rights of way, if desired?"

DDC Land Division advises that the City has obtained easements over private streets (to use the street for improving utilities) through condemnation.

Question no. 12:

"How can private roads become public roads? What's the procedure? What is the cost? Which entity pays?"

DDC Land Division advises that the City has obtained ownership over private roads (which comply with required government standards) by dedication or by acquisition/condemnation (condemnation would be part of acquisition if the parties cannot reach an agreement).

- Dedication or acquisition/condemnation required City Council approval.
- The cost for acquisition/condemnation of a road depended on the value of the road.
- The agency that wanted to acquire the property usually paid for it.

[The following attachments are posted separately:

- HRS Section 264-1 (2015); and
- ROH Section 14-32.2 (2015).]

**Note: Reformatted by Councilmember Carol Fukunaga's office.*